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Supreme Court of the United States.

OCTOBER TERM, 1902.

NO. 263.

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JAMES H. McKENNEY,
Clerk.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

against

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDMUND F. TRABUE,
GEORGE BURNHAM, JR.,
SEWELL T. TYNG,
Of counsel for appellant.

WASHINGTON, APRIL 24, 1903.

[18,437.]

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MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appellant*,

AGAINST

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR APPELLANT.

I.

Most of the argument of the learned counsel for the appellees is devoted to the merits on the questions of multiplicity of suits, trust fund, etc., and to the efficacy of the proceedings in the state court, notwithstanding that the positive averments of the bill as to want of jurisdiction of the state court are admitted by the motion to dismiss for want of jurisdiction. As Mr. Justice White said in *Howard* v. *De Cordova*, 177 U. S. 609, 614:

> "Besides this decisive consideration, the proceedings in the state court, whatever may have been their efficacy as a defense to the charges of fraud contained

> in the bill, as to which we express no opinion, were not adequate to defeat the jurisdiction of the Circuit Court of the United States. In other words, they address themselves not to the jurisdiction of the court, but to the merits of the cause. *Huntington* v. *Laidley*, 176 U. S., 668."

So also in *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 40, Mr. Justice Brown said :

> "In passing upon these questions we wish it to be distinctly understood that we express no opinion in this case except upon the jurisdiction of the Circuit Court to entertain this bill, and its authority to pass upon the several defenses set up in response thereto. We do not say that the court may not ultimately come to a conclusion to dismiss the bill upon its own allegations, if the several questions be raised by demurrer; but we do not think it was proper to dispose of them by motion to dismiss for want of jurisdiction. The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has attempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits."

It is true that the appellees' brief (at p. 7) asserts that the Circuit Court "overruled said demurrer and plea;" but this must be an inadvertent mistake, for the record does not show it. So also it is said in appellees' brief that the motion to dissolve the injunction was made "upon the same grounds as relied upon in their demurrer and plea to the jurisdiction of the court," at page 8; but the perusal of the record will show that the third ground of demurrer, namely, to the

merits (p. 42), was not contained either in the motion to dissolve (p. 44) or in the assignment of errors in the Circuit Court of Appeals (p. 45). At any rate, no such practice as dismissing a bill on motion has ever been sanctioned by this court.

II.

It is proper to mention that there is absolutely nothing in the record to sustain many statements in the appellees' brief—*e. g.*, that the receiver "took possession of the assets" (see p. 6 and pp. 55–56). This is not only inaccurate but quite inconsistent with the following concession in the brief (at p. 27):

> "At the time of filing its bill of complaint in the U. S. Circuit Court the receiver had collected no money belonging to the Association or in any way prejudiced its rights."

This appeal does not present the case of a state court actually in possession of property sought to be disturbed or interfered with by a federal court, and therefore the authorities which hold that possession ought not to be interfered with are not in point. Actual possession presents different considerations than mere threatened trespasses under color of a void order or judgment. Indeed, possession under a *void* order would not be a defence. *Gumbel* v. *Pitkin*, 124 U. S. 131, 146.

III.

As to the proceeding for the appointment of the receiver, the question is not what is proper practice in the federal courts or in other States, but whether, *under the laws of Ken-*

tucky and in the very teeth of its Code, a receiver can be appointed without the institution of a new suit, the issue of a summons or warning order, and an opportunity to be heard. The matter is not of form, but of substantive right. Are we entitled to a day in court? In Kentucky, no receiver can be appointed after judgment except upon a new suit in the nature of a creditor's bill. The Code provisions and authorities cited in the original brief establish this conclusively (pp. 42–43).

The cases of *Wells* v. *Deposit Bank, 18 Ky. L. R. 156, and Caldwell* v. *Same, 22 Ibid. 684*, relied on by appellees, have no application. They were not cases where an action at law was instituted, but both controversies arose out of an action to *settle the estate* of W. T. Hardin, deceased. Such an action is governed by *Sec. 428 and next succeeding sections, Civil Code*, which require a *settlement* of the decedent's estate, and an adjudication *of all claims whatever* against it. *Sec. 436* even provides for an injunction *against the prosecution of any other actions.* The judgment for the bank, upon which *fi. fa.* was issued and returned *nulla bona*, was obtained upon a claim asserted by the bank against decedent *in the settlement suit.* When the *fi. fa.* was returned *nulla bona*, the bank was not at liberty to institute an independent suit *under Sec. 439*, but was required to litigate every claim it had in the settlement suit, the last suit which could ever be brought against the decedent's representatives.

The question now presented was not raised in the settlement suit, and no objection was made to the supplemental petition filed in said suit after the return of *nulla bona*, and as the bank's supplemental petition was dismissed, *no adjudication was made in favor of* such a proceeding.

But had the question been raised and the proceeding been upheld, the decision would have been no precedent in the present case, because the suit in which the supplemental petition was filed *was a pending suit;* there had been no final judgment disposing of it; and the claim which was set up by the supplemental petition was, as was every other claim against the decedent's estate, properly cognizable in that suit. Indeed, it could not be tried in any subsequent suit, for that suit was the last permissible. The cases, therefore, are not relevant.

IV.

Upon the question whether or not an appointment of a state officer by a foreign corporation as agent for service of process, pursuant to a statute requiring it as a condition to entering the State, continues in effect after withdrawal or exclusion of the corporation from the State, the case of *Forrest* v. *Pittsburgh Bridge Co.*, 116 Fed., 357, 359, Circuit Court of Appeals, seventh circuit, expressly holds that such authority ceases with the withdrawal. To the same effect are *Mutual Reserve Fund L. Ass'n* v. *Boyer*, 62 Kansas 31, 39; *Millan* v. *Mutual Reserve Fund L. Ass'n*, 103 Fed. Rep. 764, 770, following *Swann* v. *Mutual Reserve Fund L. Ass'n*, 100 Fed. Rep. 922, and *Friedman* v. *Empire L. Ins. Co.*, 101 Fed. Rep. 535. In *People* v. *Commercial Alliance L. Ins. Co.*, 7 N. Y. App. Div. 297, 299, the New York court unanimously held that service upon an insurance commissioner after cessation of business in the State would not sustain a judgment entered thereon against the corporation. The case of *Pervanger* v. *Union Casualty & Surety Co.*, 32 So.

Rep. 999 (Sup. Ct., Miss.), apparently is to the contrary. *Magoffin* v. *Mutual Reserve Fund L. Ass'n*, 91 N. W. Rep. 1115 (Sup. Ct., Minn.), is clearly distinguishable, because in that case the Minnesota statute expressly provided that the appointment should be irrevocable, "so long as any liability of the company remains outstanding" in the State. So, also, in *Collier* v. *Mutual Reserve Fund L. Ass'n*, 119 Fed. Rep., 617, 618, the Arkansas statute expressly provided that the stipulation for service could not be revoked "so long as any liability of the stipulating company to any resident of this State continues." No such provision is contained in the Kentucky statute before the court.

The case of *Henrietta Mining and Milling Co.* v. *Johnson*, 173 U. S. 221, is not in point, because there it clearly appeared that service was made within the jurisdiction upon a general manager of the company, and the only point involved was whether or not a statutory provision for service upon one class of agents was exclusive.

As to the right of the federal court to judge for itself upon the sufficiency of service to meet the constitutional requirement of due process, see also *McCord Lumber Co.* v. *Doyle*, 97 Fed. Rep. 22, 23; *Moredock* v. *Kirby*, 118 Fed. Rep. 180; *Cady* v. *Associated Colonies*, 119 Fed. Rep. 420, 424. Indeed, the cases of *St. Clair* v. *Cox*, 106 U. S. 350, 355, and *Conn. Mutual L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 617, recognize that this is essentially a question for the federal courts to determine for themselves—that is, whether or not the defendant corporation was actually served within the constitutional requirement of due process. See also *Williamson* v. *Berry*, 8 How. 495, 540.

As to the jurisdiction to enjoin under section 720, R. S., see *National Surety Co.* v. *State Bank*, 120 Fed. Rep. 593, published since the preparation of the original brief.

V.

In Kentucky, all actions at law or in equity are commenced by filing a petition and the issue of summons. A petition commencing a judgment creditor's action in equity would contain the matter set forth in the "amended or supplemental petition" filed in the state court (pp. 23–24). This petition alleges new matter, makes allegations of fraud and prays for equitable relief. The original suit having been at law, the court on the filing of the petition had to transfer the action to the equity docket (p. 22). Such petition so seeking equitable relief averred the recovery of a judgment "in the sum of two thousand three hundred and sixty dollars ($2,360), with interest from May 19, 1900" (p. 23). Although no summons was issued and no opportunity whatever given to the defendant Association to meet the allegations of fraud, a receiver was appointed. Even if the statute of Kentucky sanctioned relief against an absent and unheard defendant without notice or summons, it is submitted that the nature of the proceeding would not be changed: it would remain essentially a judgment creditor's suit in equity, for it has all the elements of such a suit. *Barrow* v. *Hunton*, 99 U. S. 80, 85; *Bondurant* v. *Watson*, 103 U. S. 281, 286; *Marshall* v. *Holmes*, 141 U. S. 589, 598. And as was said by Mr. Justice Bradley in *Barrow* v. *Hunton*, *supra*, quoted with approval in *Marshall* v. *Holmes*:

> "The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it."

This being so, it is submitted that the "amended and supplemental petition" in which the receiver was appointed was essentially a suit of a civil nature in equity, where the matter in dispute was $2,360 exclusive of interest (p. 23), and presented a controversy between citizens of different States. As such, it was removable under the Judiciary Act of 1875 as amended by the act of August 13, 1888. It is no longer open to question that such a creditor's bill on a judgment of a state court may be filed in a United States Circuit Court. *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 207.

In the case at bar, the bill alleges the proceedings on removal (pp. 6, 27–29). The petition was presented on August 22, 1900, within eighteen days after the filing of the so-called amended petition. A perusal of the petition and bond will show that the requirements of the statute were complied with. Hence any subsequent proceedings in the state court would be absolutely void. *Kern* v. *Huidekoper*, 103 U. S. 485. The fact that at the time the bill of complaint in the present suit was filed—one day after the filing of the petition for removal—the removal record had not yet been filed in the United States Circuit Court was immaterial. *Railroad Co.* v. *Koontz*, 104 U. S. 5, 13; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 122. Indeed, the record may be deemed to have been filed at the same time as the present bill.

If the case was removable, there should be no reasonable doubt of the power of the Circuit Court to enjoin the defendant Phelps and the receiver from further proceeding in the state court within the cases of *French* v. *Hay*, 22 Wall. 238. 248, and *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497.

WASHINGTON, APRIL 24, 1903.

WILLIAM D. GUTHRIE,
EDMUND F. TRABUE,
GEORGE BURNHAM, JR.,
SEWELL T. TYNG,
Of counsel for appellant.